

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW FLUELLEN,

Defendant-Appellant.

UNPUBLISHED

October 4, 2007

No. 271505

Wayne Circuit Court

LC No. 05-009618-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting and obstructing a police officer, MCL 750.479, for which the trial court sentenced him as a fourth habitual offender, MCL 769.12(1)(b), to a term of imprisonment of 22 months to 15 years. Defendant appeals as of right, with appellate counsel challenging the imposition of court costs and reimbursement for defense counsel's fees, and defendant, *in propria persona*, seeking a remand to determine reasons for the delay in bringing charges. We affirm in part, vacate in part, and remand.

The prosecutor's theory of the case was that in November 2000, police officers observed defendant driving a stolen car aggressively through a residential area, and were able to arrest defendant only after overcoming his forceful physical resistance and brief flight.¹

I. Appellate Counsel's Issues

In addition to the term of imprisonment, the trial court ordered defendant to pay \$600 in court costs, and \$1,120 in attorney fees. There was no objection to either of these financial assessments at sentencing, which leaves appellate challenges relating to them unpreserved.

A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Our

¹ Defendant was also charged with receiving or concealing stolen property worth at least \$1,000 but less than \$20,000, MCL 750.535(3)(a), but the jury found him not guilty of that charge.

Supreme Court admonishes that where unpreserved plain error is shown, “[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity of public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* (bracketed interpolation retained, internal quotation marks and citation omitted). In this case, because appellate counsel does not challenge defendant’s conviction, but only certain financial aspects of his sentence, we regard plain error review as requiring that we ascertain whether appellate counsel has shown that those financial penalties were unlawfully imposed.

A. Costs

“A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute.” *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995); see also *People v Jones*, 182 Mich App 125, 127; 451 NW2d 525 (1989). In this case, because there was no objection, the trial court felt no obligation to indicate the authority under which it imposed court costs. The statutes under which defendant was convicted and sentenced, MCL 750.479,² MCL 769.12, and MCL 769.13, include no such authorization. However, the enactment of the legislative sentencing guidelines included the authorization of a trial court, “[a]s part of the sentence,” to “order the defendant to pay any combination of a fine, costs, or applicable assessments,” as well as restitution as provided by law. MCL 769.34(6).³ In light of the latter statute, the imposition of costs in this case was not plain error.

B. Attorney Fees

Defendant went to trial with a court appointed attorney, at public expense, on the ground of indigence. See MCR 6.005(A) and (D). However, “[i]f a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.” MCR 6.005(C). A trial court making a determination of a defendant’s ability to afford counsel is obliged to consider the factors set forth in MCR 6.005(B).

Appellate counsel argues that the post trial order requiring defendant to reimburse his attorney’s fees, accompanied by no discussion or proceeding inquiring into his ability to pay, violated his due process rights. We express no opinion concerning the propriety of requiring

² Applicable to this case is the statute as it read before being substantially rewritten by 2002 PA 270. The current version joins the older one in including no authorization for the imposition of court costs as part of a sentence.

³ Moreover, MCL 769.1k(1)(a), which went into effect on January 1, 2006, several months before the instant sentencing, likewise authorizes the imposition of costs. Because MCL 769.34(6) authorized the imposition of the costs here at issue, we need not reach the question whether MCL 769.1k applies to all sentencing procedures after its effective date, or only to those following from crimes committed after that date.

defendant to pay \$1,120, or any other amount, in reimbursement, but hold that remand is necessary in order to fulfill basic procedural requirements.

Where a defendant fails to object to a reimbursement amount at the time it is ordered, the trial court need not make a finding on the record concerning the defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004). "However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. In this case, the record is devoid of any indication that the trial court gave any thought to the question of defendant's present or future ability to pay. See *id.* at 255. Accordingly, we hereby vacate the reimbursement order, and remand this case to the trial court for reconsideration, on the record, of the reimbursement question.

II. Defendant's Issue

Defendant seeks a remand to develop the record in connection with his claim that he suffered prejudice from the nearly five-year delay in prosecuting him for the instant crime. Defendant reports that that he was originally arrested and charged in connection with the conduct underlying this case on November 6, 2000, but that the charges were dismissed without prejudice the following month when he was returned to the custody of the Department of Corrections for violation of his parole from an unrelated conviction and sentence. Defendant complains that the prosecutor waited until long after he was again released on parole, in June 2004, to reissue the warrant for his arrest in this case.

"When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however, there is a justifiable reason for the delay, the defendant must show . . . that the prejudice resulting from the delay outweighs any reason provided by the state." *People v Bisard*, 114 Mich App 784, 790; 319 NW2d 670 (1982).

Defendant complains that "the prosecution elected to reissue a warrant charging defendant again with the same offenses that previously were dismissed," and asserts that "the prosecution's failure to learn or determine his location within the Department of Corrections or timely place the warrant information in the LEIN prior to his release from . . . custody . . . was a deliberate delay to prejudice him which resulted in an incursion of his liberty after being released to parole." But defendant does not say precisely how he was prejudiced by the delay, other than to state, with no elaboration, that the delay "denied defendant the opportunity to an imposition to current [sic] or termination of prior sentence under MCL 791.234(5)."

The statute defendant cites provides that "[i]f a prisoner . . . has 1 or more consecutive terms remaining to serve in addition to the term he or she is serving, the parole board may terminate the sentence the prisoner is presently serving at any time after the minimum term of the sentence has been served." But we note that this legislation neither *requires* more lenient termination of an existing sentence, nor otherwise necessarily improves a prisoner's position, where another, consecutive, sentence awaits, and that defendant offers no explanation regarding precisely how operation of that statute might have benefited him had more timely proceedings brought his new sentence to bear while he was still serving the earlier one.

In light of defendant's failure to show that he was at all prejudiced by the delay in the instant prosecution, we conclude that no remand is required to determine the motives or reasons behind the prosecutor's timing.

III. Conclusion

The order to pay costs is affirmed, but the requirement that defendant pay attorney fees is vacated. On remand, the trial court should consider again whether reimbursement of attorney fees is appropriate in light of the principles espoused in this opinion. The trial court need not inquire into the reasons for the prosecutor's delay in bringing charges.

We affirm in part, vacate in part, and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Karen M. Fort Hood